IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 23RD MARCH 2007 / 2ND CHAITHRA 1929

SA.No. 117 of 1993()

AS.79/1989 of SUB COURT, PAYYANNUR
OS.315/1985 of MUNSIFF COURT, THALIPARAMBA

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APPELLANT: APPELLANT/1ST DEFENDANT

VAITHALA PUTHIYA PURAYIL NABEESUMMA,
D/O.KATHEEYA UMMA, RESIDING AT CHUZHALI AMSOM,
KOLATHOOR DESOM, TALIPARAMBA TALUK.
(DIED. LRS. IMPLEADED.)
SUPPLEMENTAL APPELLANTS

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1. VYTHILA PUTHIYAPURAYIL HAMZA,
   S/O.LATE VYTHILA PUTHIYA PURAYIL
   NABEESUMMA, VYTHILA PUTHIYAPURAYIL
   THALAKULAM CHUZHALI P.O.
   SREEKANDAPURAM, KANNUR DISTRICT.

2. -DO- AMINA, D/O. -DO-

3. -DO- MAMMAD, S/O. -DO-
4. -DO- SAINABA, D/O.-DO-
5. -D0-ABDULLA MUSALIYAR, S/O.-DO-
6. -DO-KHADEEJA, D/O.-DO-

7. -D0-ASSIYA, D/O. -DO-
8. -DO-HUSSAIN MUSALIYAR, S/O.-DO-
9. -DO- ABDUL KHADER MUSALIYAR, S/O. -DO-
10. -DO-FATHIMA, D/O. -DO-

IT IS RECORDED THAT THE ORIGINAL APPELLANT DIED AND SUPPLEMENTAL APPELLANTS 1 TO 10 ARE IMPLEADED AS THE LRS OF DECEASED SOLE APPELLANT AS PER ORDER DATED 05-12-2002 IN C.M.P.1923/02.

BY ADV.SRI.K.V.SOHAN

RESPONDENTS/RESPONDENTS/PLAINTIFFS AND DEFENDANTS 2 TO 5

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1. KAKKOTTKATH SARA UMMA, W/O.VAITHALA
   PUTHIYA PURAYIL MAMMAD.(DIED).
2. ASSAINAR

3. AYISUMMA
4. IBRAYAN(DIED. LRS IMPLEADEDADDL.R21 TO R27)
.
5. AMSA (DIED. LRS IMPLEADED AS SUPPL. R11 TO R20)

6. PATHUMMA

R1 TO R6 RESIDING AT PANNIYOOR AMSOM
POOMANGALAM DESOM IN HOUSE NO.K.P.IV-5 TALIPARAMBA
TALUK.
7. VAITHALA PUTHIYAPURAYIL ABDUL KHADER,
SON OF LATE AYISSUMMA, AGED 64 YEARS RYOT
8. VAITHALA PUTHIYAPURAYIL AMINA UMMA
D/O.LATE PATHUMMA, AGED 64 YEARS, NO OCCUPATION.
9. ABOOBACKER, AGED 39 YEARS, RYOT.
10. AMSA.
R7 TO R10 RESIDING AT CHUAZHALI AMSOM KOLATHUR
DESOM IN TALIPARAMBA TALUK IN HOUSE NO.C.P.IX 31
.RESPONDENTS 2 TO 6 ARE RECORDED AS THE LRS OF DECEASED
R1 AS PER ORDER DATED 9/10/1995 ON CMP 1174/1995.
SUPPLEMENTAL RESPONDENTS
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11. NAFEESA VACHAPURATH, W/O.AMSA, AGED 40,
POOMANGALAM, P.O. PANNIYUR, VIA. KARIMBAM,
CANNANORE DISTRICT.

12. ABDU NAZIR VACHAPURATH, S/O.LATE AMSA
AGED 22, -DO-
13. ZEENATH VACHAPURATH, D/O.LATE AMSA
AGED 19 YEARS, -DO-
14. NOUSHAD VACHAPURATH, S/O.LATE AMSA,
AGED 18 YEARS, -DO-
15. NAFEESA M.K. W/O.LATE AMSA, AGED 38
BELLA BEACH, P.O. KANHANGAD.
16. BUSHRA K.M. D/O.LATE AMSA, AGED 19,
-DO-
17. SAMEERA K.M. -DO- AGED 16, (MINOR)
18. AYISHA K.M. -DO- AGED 13, (MINOR)
19. MUHAMMED FISEL K.M. S/O.LATE AMSA, AGED 11, (MINOR)
-DO-
20. NAZEERA, D/O.LATE AMSAM AGED 9 (MINOR)
(MINOR RESPONDENTS 17 TO 20 REPRESENTED NEXT FRIEND
GUARDIAN MOTHER RESPONDENT NO.15)
IT IS RECORDED THAT 5TH RESPONDENT DIED AND SUPPLEMENTAL
RESPONDENTS 11 TO 20 ARE IMPLEADED AS THE LRS OF DECEASED
5TH RESPONDENT AS PER ORDER DATED 5-12-02 IN C.M.P.1778/96.

BY ADV. SRI.P.G.K.WARRIER FOR ADDL.R15 TO R20
" K.K.RAVINDRANATHY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/3/07
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.117 OF 1993

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Dated this the 23rd day of March, 2007

JUDGMENT

First defendant in O.S.315/1985 is the appellant. Respondents 1 to 6 are the plaintiffs and the other respondents the other defendants. Suit was filed for partition and separation of the shares of the plaintiffs. The property sought to be partitioned is the property obtained by Ibrahim under Ext.A1 marupat, which was bequeathed by Ibrahim under Ext.B1 will. Item No.1 therein is the plaint schedule property. It is the property which was covered under Ext.A1 marupat. The property is available for partition was not disputed by any of the parties. The dispute at the time of trial was with regard to the special rights, because of the covenants in Ext.B1 Will, which according to plaintiffs is binding and which according to defendants is not binding. The trial court found that covenants are not binding and

entire 1.24 acres in R.S.No.77/1 consisting of plots A, B and D in Ext.C1 plan are to be divided into six equal shares and plaintiffs are to be allotted two shares. The decree and judgment were challenged before Sub Court, Payyannur in A.S.87/1988 by plaintiffs in A.S.87/1988 and first defendant in A.S.79/1989. Learned single Judge dismissed A.S.79/1989 holding that the convenants in Ext.B1 Will are not valid and the property is available for partition. A.S.87/1988 was allowed modifying the preliminary decree to the effect that the property available for partition is plots A and C in Ext.C1 plan. First defendant is challenging the modified preliminary decree in the second appeal.

2. The real dispute between the parties was with regard to the actual identity and location of the property to be divided. There is no dispute with regard to the shares. Commissioner submitted Ext.C2 report and C1 plan. Commissioner has shown plaint schedule property as plots A to F. The

Commissioner identified plot A as the property covered under Ext.A1 marupat. Ext.C1 report shows that when Commissioner inspected the property, both plaintiffs and defendants admitted that plot B which lies to the north of plot A is also part of the property covered under Ext.A1 marupat and is available for partition. So also when the Commissioner inspected the property , 5th plaintiff who was examined as PW1 on behalf of all the plaintiffs, submitted before the Commissioner that plot D which lies to the west of the rainwater channel is also available for partition as part of Ext.A1 property. It is on that basis the trial court granted a decree for partition of plot A, B and D. The Appellate Court excluded plot B and D from the property to be divided on the basis that Commissioner identified only plot A and C as the property covered under Ext.A1 and B1. The dispute is whether the identification made by the Commissioner is correct and whether the property which lies to the east namely , plot D, plot E and

plot F are properties obtained by Ibrahim under Ext.A1 marupat and bequeathed under Ext.B1. Plaintiffs contended that the property which lies to the east of the property covered under Ext.A1 and B1 were obtained by Kannan Nair under Ext.A3 marupat and was later assigned in favour of Moideen and was purchased by the father Mammad and under Ext.A7 purchase certificate was also obtained and therefore the said property is not available for partition.

3.The argument of learned counsel appearing for appellant is that the property is to be identified not with reference to the extent or kole measurement but with regard to the boundaries and if so identified, the entire plots A,B,C,D,E and F forms part of the property obtained under Ext.A1. Learned counsel appearing for respondents argued that the Commissioner identified the property correctly and therefore only plot A is available for partition.

4. On hearing learned counsel appearing for

appellant and respondents, it is clear that there is no dispute with regard to the availability of Ext.A1 property which was later bequeathed under Ext.B1, for partition among the plaintiffs and defendants. The extent available for partition need not be decided in the preliminary decree, as that is a question which can be decided in the final decree. Therefore interest of justice will be met, if the finding of courts below with regard to the extent of the property to be divided is set aside and that question is left open to be decided in the final decree application. It is made clear that in the final decree application, Court has to fix the property obtained under Ext.A1 which was bequeathed as item No.1 under Ext.B1. The identification of the property shall not be restricted to the kole measurements. While identifying the property, the boundaries cannot be ignored. The court has also to decide whether the property claimed for division forms part of Exts.A3 and A4. After fixing the actual extent,

properties are to be divided in accordance with the preliminary decree.

Second appeal is therefore allowed in part. The preliminary decree passed by learned Munsiff and confirmed by learned Sub Judge are confirmed subject to the following modification. The property available for partition is the property covered under Ext.A1 marupat and bequeathed under item No.1 of Ext.B1 Will. In the final decree application the exact identity, extent and location of the property is to be fixed as stated earlier. Thereafter the property is to be divided into six equal shares as provided in the preliminary decree.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.117 /93

JUDGMENT

23rd March,2006